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CHARLES ELMORE

No. 811

Supreme Court of the United States

..... TERM, 1931

GENERAL IMPORT & EXPORT COMPANY, INC.,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

LOUIS HALLE,
Counsel for Petitioner.

CORPORATE PRESS, INC., New York City

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GENERAL IMPORT & EXPORT COMPANY, LTD.,
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against
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully represents:

That it is the owner of the vessel S. S. *Sebastopol.* That on the 11th day of August, 1927, at a point in New York Harbor the said vessel was boarded and the crew and master thereof were arrested while in the act of transporting intoxicating liquors aboard said vessel.

That on November 18, 1927, a libel was filed by the United States of America against the said vessel alleging the liability of the vessel to penalties of $500 for the failure of the master to produce a manifest and to a further penalty of $152,000, the appraised domestic value of the merchandise found on board which was not included or described in any proper manifest, invoking sections 431, 581, 583, 584 and 594 of the Tariff Act of 1922.

That on January 12, 1931, the District Court rendered its opinion dismissing the libel without costs. An appeal was taken to the Circuit Court of Appeals for the Second Circuit which reversed the decree of the District Court and ordered the imposition of the penalties against the vessel.

Question Presented.

The question presented is whether a vessel seized by customs officers while illegally transporting a cargo of intoxicating liquors within the territorial waters of the United States, must be proceeded against by the government only as provided in section 26, Title II of the National Prohibition Act, or whether in lieu of such proceeding the United States may libel the vessel under the Tariff Act of 1922, sections 431, 581, 583, 584 and 594 thereof.

The reasons for granting this writ are many and cogent. Since the *Richbourg* decision there have been a diversity of opinions expressed upon this subject by the lower courts. There is now pending before this Honorable Court a petition for writ of certiorari in

> *United States of America, Petitioner* v. *Commercial Credit Co.*, No. 734, October term, 1931.

That petition in the appendix reveals the conflict of opinion. It may be added that in the petition in a companion case of the

> *Ruth Mildred,* October term, 1931, No. 795,

at page 5 thereof, the Solicitor General proposes to offer no opposition to this petition.

Opinions Below.

The opinion of the District Court is reported in 47 Fed. (2d) 336. That of the Circuit Court of Appeals has not yet been reported, and is therefore printed in the appendix.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Statutes Involved.

The statutes involved are section 26, Title II of the National Prohibition Act, and sections 431, 581, 583, 584 and 594 of the Tariff Act of 1922, printed in the appendix.

Specification of Error to be Urged.

The Circuit Court of Appeals erred in holding that a vessel discovered in the act of transporting intoxicating liquors within the territorial waters of the United States may be proceeded against under the Tariff Act of 1922, sections 431, 581, 583, 584 and 594.

Wherefore, your petitioner prays that a writ of certiorari may issue out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court for review and determination as provided by law, the above cause, and a complete transcript of the record and all proceedings therein, that your petitioner may have such other and further relief in the premises as to this Court may seem appropriate.

General Import & Export Company Inc

Petitioner,

by Louis Falle

Attorney in Fact.

Dated, New York, March 10th, 1930.

United States of America,
Southern District of New York, } ss.:
County of New York,

LOUIS HALLE, being duly sworn, says: I am the attorney in fact for the petitioner herein; I have read the said petition and know the contents thereof. The facts therein stated are true to the best of my knowledge, information and belief.

I hereby certify that I have examined the foregoing Petition for a Writ of Certiorari and that in my opinion it is well founded and should be granted by this Honorable Court.

Sworn to before me this
19th day of March, 1932.

Louis Halle

Gustave Halle

Notary Public.
Kings Co. No. 114, Reg. No. 2115.
Cert. filed in N. Y. Co. 246, Reg. No. 2[illegible]155.
Com. expires March 30, 1932.

SUPREME COURT OF THE UNITED STATES.

GENERAL IMPORT & EXPORT COMPANY, LTD.,
Petitioner,
against
UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Questions Argued.

Section 26, Title II of the National Prohibition Act is the only section of the law pursuant to which a vessel may be proceeded against when seized after discovery in the act of transporting intoxicating liquors within the territorial waters of the United States.

Facts.

The *Sebastopol* is a British vessel. On August 11, 1927, she was observed by the Coast Guard at a point in New York Harbor. She appeared suspicious to the Coast Guard and the vessel was signalled to stop (R. 17). The vessel was then boarded and the ship's manifest was demanded. The vessel was found to be the British Steam Trawler *Sebastopol* of St. Johns, Newfoundland. It was laden with a cargo of liquor (R. 18). When first sighted, the *Sebastopol* was a quarter of a mile away from shore (R. 20).

The vessel was equipped with numerous name plates other than her own, such as *Westmoreland* and *Mary*

Emily. The cargo consisted of intoxicating liquor containing one-half of one per cent of alcohol by volume and fit for beverage purposes (R. 25).

Immediately on boarding the vessel the Coast Guard observed a case of liquor in the pilot house, open (R. 27). No manifest was produced (R. 29). The men were arrested and charged with a violation of the Prohibition Act (R. 30). 4,841 cases of liquor were found aboard. The *Sebastopol* was appraised at $7,500 and the value of the cargo fixed at $48,410 (R. 32).

POINT I.

Section 26, Title II, of the National Prohibition Act is the exclusive statute under which the United States may proceed against the vessel and it was error of the Circuit Court of Appeals to sustain the libel under the Tariff Act of 1922, Sections 431, 581, 583, 584 and 594.

It is respectfully urged that the decision of this Court in

Richbourg Motor Co. v. *United States,* 281 U. S. 528, 74 L. Ed. 1016,

is determinative of the question involved. The pertinent language of that decision reads as follows:

> "But the prescription in detail, by section 26, *whenever transportation is involved,* of successive steps to be taken, which, if followed, lead unavoidably to forfeiture *under that section and no other,* with the important consequence of protecting the interests of innocent third persons, suggests a definite purpose to make the protection effective by

> bringing all forfeitures in such cases under its controlling provisions. If the purpose were the more general one of imposing on government officers the general duty to procure the forfeiture at their election, either under section 26 *or any other applicable statute,* most of the requirements of section 26 might have been omitted. The end sought could have been attained more easily by the simple enactment, in the language of section 3450, that the offending vehicle 'shall be forfeited,' saving the rights of innocent lienors if the proceeding were had under section 26." (Italics ours.)

As this Honorable Court has held, the provisions of section 26 are mandatory. Its language is rendered no less mandatory when the sections of the Tariff Act are invoked. As we contend that the conclusion of the Circuit Court of Appeals is erroneous, we shall proceed to point out the errors of its reasoning.

The Circuit Court of Appeals erred in holding that there is no direct conflict between sections 481, 581, 583, 584 and 594 of the Tariff Act of 1922 and section 26 of the National Prohibition Act.

It must be noted that section 26 of the National Prohibition Act is effective as against guilty owners and guilty lienors. As to their interests, and only to such extent is the *res* penalized if innocent owners or lienors are vigilant of their rights. Under the Tariff Act provisions in question the *res* is liable to the extent of the penalty imposed upon the master. This, irrespective of the innocence of the owner. Such penalties are necessarily in conflict. It would seem therefore, that the Circuit Court of Appeals is in error in stating in its opinion:

> "We are disposed to say that no direct conflict appears when only the lien of a penalty is being enforced."

for the reason that section 26 of the National Prohibition Act results only in imposing penalties against the *res* as to each guilty lienor or owner.

By section 594 of the Tariff Act of 1922, the vessel is held for the payment of the penalty against the master. By section 26 of the National Prohibition Act the vessel is ordered sold and the interests only of guilty lienors are lost. Section 594 of the Tariff Act of 1922 provides *inter al:*

> "Such vessel or vehicle shall be held for the payment of such penalty."

Section 26 of the National Prohibition Act provides that the Court upon conviction of the person arrested in transportation shall

> "order a sale by public auction of the property seized, * * * shall pay all liens according to their priorities, which are established, * * * as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts."

Where transportation is involved, section 594 of the Tariff Act of 1922 is therefore necessarily in direct conflict with section 26, by parity of reasoning with the opinion in

> *United States* v. *One Ford Coupe Automobile*, 272 U. S. 321, 71 L. Ed. 279;

and

> *Richbourg Motor Co.* v. *United States, supra.*

The Circuit Court of Appeals further erred in holding that if there is a direct conflict between the Tariff Act pro-

visions and section 26 of the National Prohibition Act, that the former being enacted later in time supersedes the National Prohibition Act.

The Circuit Court of Appeals stated in its opinion:

> "Therefore, notwithstanding the above-mentioned canon of interpretation and despite the statement in Paragraph 801 of the schedule that nothing in this schedule shall be construed as limiting or restricting the provisions of the National Prohibition Act, we cannot interpret sections 584 and 594 otherwise than as applying specifically to an unmanifested cargo of intoxicating liquor and as superseding pro tanto the earlier enacted section 26 if a conflict exists."

So far as section 594 of the Tariff Act of 1922 relates to vessels, that enactment is substantially similar to Revised Statutes, section 3088, 14 Stat. L. 180, Act of July 19, 1866, except that section 594 refers to "Customs Revenue Laws" while Revised Statutes, section 3088 refers to "Revenue Laws."

It would appear therefore, that if the National Prohibition Act may be construed to be in conflict with section 594 of the Tariff Act of 1922, it must necessarily have been in conflict with Revised Statutes, section 3088. Hence, the National Prohibition Act, by section 35 thereof, would be the paramount statute. Query: May the enactment of section 594 of the Tariff Act of 1922 in substantially the same language as section 3088 of the Revised Statutes render inapplicable section 26 of the National Prohibition Act?

In any event the mandatory provisions of section 26 must govern even though a later general enactment may embrace the same subject matter.

Furthermore, section 584 of the Tariff Act of 1922 concludes with this pertinent provision:

"The provisions of this paragraph shall not prevent the forfeiture of any such vessel or vehicle under any other provision of law."

Wherefore, it is respectfully submitted that this petition should be granted.

Thomas Hall

Counsel for Petitioner.

March, 1932.

Appendix.

Section 26 of the National Prohibition Act:

Unlawful Transportation of Liquor; Seizure and Destruction of Liquor and Sale of Vehicle.—When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this chapter in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expense of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created

without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water or air craft, or automobile, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken or if there be no newspaper published in such city or county, in a newspaper having circulation in the county, once a week for two weeks and by handbills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold and the proceeds after deducting the expenses and costs shall be paid into the Treasury of the United States as miscellaneous receipts. (Oct. 28, 1919, c. 85, Title II, Sec. 26, 41 Stat. 315.)

Section 431 of the Tariff Act of 1922:

"**Manifests, Form and Contents.**—The master of every vessel arriving in the United States and required to make entry shall have on board his vessel a manifest in a form to be prescribed by the Secretary of the Treasury and signed by such master under oath as to the truth of the statements therein contained. Such manifest shall contain:

First. The names of the ports at which the merchandise was taken on board and the ports of entry of the United States for which the same is destined, particularly describing the merchandise destined to each such port. The master of any vessel laden exclusively with coal, sugar, salt, nitrates, hides, dye-

woods, wool, or other merchandise in bulk consigned to one owner and arriving at a port for orders, may destine such cargo "for orders," and within fifteen days thereafter, but before the unlading of any part of the cargo such manifest may be amended by the master by designating the port or ports of discharge of such cargo, and in the event of failure to amend the manifest within the time permitted such cargo must be discharged at the port at which the vessel arrived and entered.

Second. The name, description, and build of the vessel, the true measure or tonnage thereof, the port to which such vessel belongs, and the name of the master of such vessel.

Third. A detailed account of all merchandise on board such vessel, with the marks and numbers of each package, and the number and description of the packages according to their usual name or denomination, such as barrel, keg, hogshead, case, or bag.

Fourth. The name of the persons to whom such packages are respectively consigned in accordance with the bills of lading issued therefor, except that when such merchandise consigned to order the manifest shall so state.

Fifth. The name of the several passengers aboard, the vessel, stating whether cabin or steerage passengers, with their baggage, specifying the number and description of the pieces of baggage belonging to each, and a list of all baggage not accompanied by passengers.

Sixth. An account of the sea stores and ship's stores on board of the vessel. (Sept. 21, 1922, c. 356, Title IV, Sec. 431, 42 Stat. 950.)

Section 581 of the Tariff Act of 1922:

Boarding Vessels or Vehicles; Seizure of Vessels or Merchandise.—Officers of the customs or of the Coast Guard, and agents or other persons authorized by the Secretary of the Treasury, or appointed for that purpose in writing by a collector may at any time go on board of any vessel or vehicle at any place in the United States or within four leagues of the coast of the United States, without as well as within their respective districts, to examine the manifests and to inspect, search, and examine the vessel or vehicle, and every part thereof, and any person, trunk, or package on board, and to this end to hail and stop such vessel or vehicle, if under way and use all necessary force to compel compliance, and if it shall appear that any breach or violation of the laws of the United States has been committed, whereby or in consequence of which such vessel or vehicle, or the merchandise, or any part thereof, on board of or imported by such vessel or vehicle is liable to forfeiture it shall be the duty of such officer to make seizure of the same, and to arrest, or, in case of escape or attempted escape, to pursue and arrest any person engaged in such breach or violation. (R. S. sec. 3061; Sept. 21, 1922, c. 356, Title IV, sec. 581, 42 Stat. 979.)

Section 583 of the Tariff Act of 1922:

Production and Certification of Manifest.—The master of every vessel and the person in charge of every vehicle bound to a port or place in the United States shall deliver to the officer of the customs or Coast Guard who shall first demand it of him, the original and one copy of the manifest of such vessel or vehicle, and such officer shall certify on the back of the original manifest to the inspection thereof and return the same to the master

or other person in charge. (Sept. 21, 1922, c. 356, Title IV, sec. 583, 42 Stat. 979.)

Section 584 of the Tariff Act of 1922:

Failure to Produce Manifest; Penalty; Merchandise not Included in Manifest; Penalty and Forfeiture; Opium for Smoking; Penalty.—Any master of any vessel and any person in charge of any vehicle bound to the United States who does not produce the manifest to the officer demanding the same shall be liable to a penalty of $500, and if any merchandise, including sea stores, is found on board of or after unlading from such vessel or vehicle which is not included or described in said manifest or does not agree therewith, the master of such vessel or the person in charge of such vehicle shall be liable to a penalty equal to the value of the merchandise so found or unladen, and any such merchandise belonging or consigned to the master or other officer or to any of the crew of such vessel, or to the owner or person in charge of such vehicle, shall be subject to forfeiture and if any merchandise described in such manifest is not found on board the vessel or vehicle the master or other person in charge shall be subject to a penalty of $500. If the collector shall be satisfied that the manifest was lost or mislaid without intentional fraud, or was defaced by accident, or is incorrect by reason of clerical error or other mistake and that no part of the merchandise not found on board was unshipped or discharged except as specified in the report of the master, said penalties shall not be incurred.

If any of such merchandise so found consists of smoking opium or opium prepared for smoking, the master of such vessel or the person in charge of such vehicle shall be liable to a penalty of $25 for each ounce thereof so found. Such penalty shall constitute a lien upon such vessel which may be en-

forced by a libel in rem. Clearance of any such vessel may be withheld until such penalty is paid or until a bond, satisfactory to the collector, is given for the payment thereof. The provisions of this paragraph shall not prevent the forfeiture of any such vessel or vehicle under any other provision of law. (Sept. 21, 1922, c. 356, Title IV, sec. 584, 42 Stat. 980.)

Section 594 of the Tariff Act of 1922:

Seizure or Forfeiture of Vessels or Vehicles.—Whenever a vessel or vehicle, or the owner or master, conductor, driver, or other person in charge thereof, has become subject to a penalty for violation of the customs—revenue laws of the United States, such vessel or vehicle shall be held for the payment of such penalty and may be seized and proceeded against summarily by libel to recover the same. No vessel or vehicle used by any person as a common carrier in the transaction of business as such common carrier shall be so held or subject to seizure or forfeiture under the customs laws, unless it shall appear that the owner or master of such vessel or the conductor, driver, or other person in charge of such vehicle was at the time of the alleged illegal act a consenting party or privy thereto. (Sept. 21, 1922, c. 356, Title IV, sec. 594, 42 Stat. 982.)

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

UNITED STATES OF AMERICA,
Libellant-Appellant,

vs.

BRITISH S. S. "SEBASTOPOL," her engines, tackle, apparel, and furniture, etc.,
Claimant-Appellee.

UNITED STATES OF AMERICA,
Libellant-Appellant,

vs.

TWO-MASTED AUXILIARY SCHOONER "RUTH MILDRED," length 82 feet, beam 21.5 feet, depth 8.1 feet, Official No. 222218,
Claimant-Appellee.

Before: L. HAND, SWAN, and AUGUSTUS N. HAND,
Circuit Judges

Appeals from the District Court of the United States for the Southern District of New York

Libels of information in the admiralty were filed by the United States, one seeking forfeiture of the British steamer *Sebastopol* for violation of the customs laws, the other seeking forfeiture of the American Schooner *Ruth Mildred* for violation of the navigation laws. In each suit a decree was entered dismissing the libel, and the libellant has ap-

pealed. Decree as to the *Sebastopol* reversed; decree as to the *Ruth Mildred* affirmed.

For opinion below see 47 F. (2d) 336.

SWAN, *Circuit Judge:*

These appeals have been argued together and may be disposed of in a single opinion, although, as will appear, somewhat different considerations are involved and have led us to different results in the two suits. The general problem presented is whether a vessel which is discovered in the illegal transportation of liquor within territorial waters must be proceeded against under sec. 26 of Title II of the National Prohibition Act (27 U. S. C. A., sec. 40) rather than for a violation of the customs or navigation laws.

The libel against the *Sebastopol* sought to enforce against her, pursuant to section 594 of the Tariff Act of 1922 (19 U. S. C. A., sec. 498), penalties incurred by her master under section 584 of said Act (19 U. S. C. A., sec. 486) by reason of false manifesting of the cargo. Within territorial waters she was stopped and boarded by a coast guard officer, who, upon discovery that her cargo was falsely manifested, arrested the master and seized the vessel. The unmanifested cargo consisted of 4,841 cases of Scotch whiskey. Following seizure of the vessel, the coast guard officer signed a complaint charging the master and crew with conspiracy to violate the National Prohibition Act as well as the Tariff Act of 1922. Nothing appears as to the ultimate disposition of this complaint. These facts, the claimant contended, disclosed that the vessel was engaged in the illegal transportation of liquor and required the government to proceed against her in accordance with section 26 of title II of the National Prohibition Act (27 U. S. C. A., sec. 40) instead of under the Tariff Act. The district court so held, dismissing the complaint.

That the seizure was not made by a prohibition officer would not preclude the government from proceeding under section 26. *Dodge* v. *United States*, 272 U. S. 530; *Commercial Credit Co.* v. *United States*, 276 U. S. 226. That section preserves the rights of innocent owners or lienors; while forfeiture under the Tariff Act proceeds without regard to innocent interests. It is true that executive clemency may remit the forfeiture in favor of innocent persons (19 U. S. C. A., secs. 520, 532), but mitigation by grace is not the equivalent of statutory immunity from forfeiture. The two procedures are, therefore, in direct conflict when applied to the forfeiture of a vessel seized within territorial waters while transporting unmanifested liquor; and the Prohibition Act, were it the later enactment, would prevail, as the Supreme Court held it did with respect to Revised Statutes, sec. 3450. *Richbourg Motor Co.* v. *United States*, 281 U. S. 528. But it is to be observed that the particular sections of the Tariff Act under which the libel against the *Sebastopol* was framed do not declare a forfeiture of the vessel; they merely impose a lien upon her for the payment of penalties incurred by the master. It may well be argued that a proceeding to enforce a lien under the Tariff Act is not in direct conflict with the proceeding to forfeit the vessel contemplated by section 26. Only by accident is it true in the case at bar that the penalty incurred is so great as to exhaust the entire value of the vessel and result in her forfeiture. The two statutes are to be read so that both may stand, if possible, and we are disposed to say that no direct conflict appears when only the lien of a penalty is being enforced.

But if there be a direct conflict, the Tariff Act must prevail over sec. 26. It is the later enactment and contains in sec. 644 an express repeal of "all laws and parts of laws inconsistent with the provisions of this Act." In

reaching this conclusion we are not unmindful of the canon of construction that an earlier specific statute may be considered an exception to a later general statute broad enough in terms to include the subject matter of the former; but we do not think it applicable here, because the Tariff Act itself deals specifically with the importation of liquors in violation of the customs. Paragraph 813 of schedule 8 reads as follows:

> No wines, spirits, or other liquors or articles provided for in this schedule containing one-half of 1 per centum or more of alcohol shall be imported or permitted entry except on a permit issued therefor by the Commissioner of Internal Revenue, and any such wines, spirits, or other liquors or articles imported or brought into the United States without a permit shall be seized and forfeited in the same manner as for other violations of the customs laws.

The forfeiture thus directed is provided for in section 584, which declares, among other things, that unmanifested merchandise (which by section 401 "includes merchandise the importation of which is forbidden") consigned to the master shall be subject to forfeiture. Under the doctrine of *The Mistinguette,* 27 F. (2d) 738 (C. C. A. 2) the liquor on the *Sebastopol* was consigned to her master. It was therefore forfeitable under section 584, and it seems clear that the other provisions of this section which impose a penalty upon the master equal to the value of the unmanifested cargo are likewise applicable although the cargo be liquor. Similarly, as to the ancillary section 594 which subjects the vessel to a lien for the penalties incurred by the master. Therefore, notwithstanding the above-mentioned canon of interpretation and despite the statement

in paragraph 801 of the schedule that nothing in this schedule shall be construed as limiting or restricting the provisions of the National Prohibition Act, we can not interpret sections 584 and 594 otherwise than as applying specifically to an unmanifested cargo of intoxicating liquor and as superseding *pro tanto* the earlier enacted section 26, if a conflict exists. Consequently the libel brought against the *Sebastopol* was erroneously dismissed.

Different considerations are applicable to the schooner *Ruth Mildred*. She was licensed to engage in the fisheries and was charged with violating her license by engaging in the illicit liquor trade. Forfeiture was sought under Revised Statutes, sec. 4377. Violation of her license results under this statute in forfeiture of the vessel without regard to the innocence of her owner. This section antedates the National Prohibition Act and is therefore superseded by section 26 so far as the two statutes are in direct conflict. As already noted with respect to the Tariff Act, the possibility of executive clemency under the provisions of Revised Statutes, section 5294, will not avoid the conflict. Dismissal of the libel against the *Ruth Mildred* was therefore right provided she was seized under circumstances which rendered section 26 applicable.

The schooner was trailed by a coast guard vessel from a point in Long Island Sound until she tied up at a dock in New York Harbor. The crew and master then left her, but a few minutes later the master returned and, on being informed that the coast guard vessel was going to stand by until the schooner's cargo was unloaded, he confessed that most of his cargo was liquor. Thereupon he was placed under arrest, the boat was seized, and a complaint filed, charging the master with conspiracy to violate the National Prohibition Act and the Tariff Act of 1922. Nothing further is disclosed regarding this proceeding.

Section 26 directs that when a person is discovered in the act of illegally transporting liquors in any water craft, the officer of the law shall seize the liquors "therein being transported contrary to law" and shall take possession of the boat. When the schooner and her cargo were seized she had come to rest at the wharf, and it may be argued with some plausibilty that the transportation was over so that section 26 no longer applied. *United States* v. *One Buick Automobile,* 33 F. (2d) 352 (S. D. Ga.); cf (before transportation began); *United States* v. *One Ford Coupe Automobile,* 272 U. S. 321; *United States* v. *One Studebaker Coach Automobile,* 32 F. (2d) 886 (C. C. A. 9). But we do not think the section should receive so technical a construction. Here the master was discovered in the act of transportation, although knowledge of the nature of his cargo was not obtained until his subsequent confession. In our opinion his possession of the liquor continued to be a possession incident to transportation, and the facts were sufficient to satisfy the condition precedent to making a seizure under section 26. See *Commercial Credit Co.* v. *United States,* 33 F. (2d) 228 (C. C. A. 9); *United States* v. *One Chevrolet Automobile,* 21 F. (2d) 277 (D. Ala.), affd. as *United States* v. *General Motors Acceptance Corp.,* 25 F. (2d) 238 (C. C. A. 5); *United States* v. *One Buick Coach Automobile,* 34 F. (2d) 318 (N. D. Ind.). Accordingly, we affirm the decree dismissing the libel as to the *Ruth Mildred.*

The problem presented by these appeals has been the subject of considerable diversity of opinion in the various circuits. An authoritative decision may soon be expected, as the Ninth Circuit has certified a similar question to the Supreme Court, *Gen. Motors Acceptance Corp.* v. *United States,* Nov. 23, 1931. Pending this decision any elaborate consideration of the authorities seems unneces-

sary. It will suffice merely to cite a few of them. As tending to favor the contentions of the appellant, see *The Pilot*, 43 F. (2d) 491 (C. C. A. 4); *United States* v. *One Reo Coupe Automobile*, 46 F. (2d) 815 (D. Mass.); *The Daisy T*, 48 F. (2d) 370 (D. Del.); *contra*, *Colon* v. *Hanlon*, 50 F. (2d) 353 (C. C. A. 1); *Commercial Credit Co.* v. *United States*, 53 F. (2d) 977 (C. C. A. 5); *United States* v. *One Studebaker Automobile*, 45 F. (2d) 430 (D. Ariz.).

Decree in No. 279 reversed and decree in No. 280 affirmed.